No. 3543.

IN THE 2

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth District

J. A. CZIZEK, *Plaintiff in Error*,

vs.

WESTERN UNION TELEGRAPH COMPANY, a Corporation, *Defendant in Error.*

BRIEF OF PLAINTIFF IN ERROR

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Upon Writ of Error to the United States District Court for the District of Idaho, Southern Division

INDEX AND CASES

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STATEMENT OF FACTS.

This is an action in tort brought originally in the District Court of Ada County, Idaho, by plaintiff, the addressee of a telegram, against the defendant telegraph company to recover the actual damages sustained by reason of the alleged gross negligence of the defendant in wholly failing to transmit or to attempt to transmit a prepaid, unrepeated business message, which message was from T. J. Jones, at Boise, to plaintiff, at Oakland, containing an offer to purchase plaintiff's 50 shares of bank stock at $90 per share, delivered to and accepted by defendant at Boise. A jury was waived by stipulation, and the

case tried by the Court. For brevity, the parties will be referred to as plaintiff and defendant. There is no controversy over the facts, as the evidence submitted to support the allegations of the complaint is not controverted by defendant, and it introduced no evidence to dispute these facts but relied upon certain special defenses based upon the printed conditions on the telegraph blank.

The facts established at the trial show, that on and prior to the delivery of the message in question to defendant on November 30, 1917, plaintiff was the owner of 50 shares of stock, of the face value of $5000, in the Idaho National Bank, located at Boise, Idaho; and T. J. Jones, an attorney at Boise, was the owner of 15 shares of this stock. Previous to that time one David Miller, a large stockholder and the vice-president of the bank, had informed plaintiff, at Boise, of his desire to purchase plaintiff's stock and to effect a merger of the Idaho National with the Pacific National Bank, at Boise. (Tr. p. 72.) Plaintiff informed Miller that he did not wish to be a party to the merger but wished to sell his stock. They discussed the value of it pro and con for a little while and did not arrive at anything, because plaintiff learned that Miller was not ready just then to buy it, but he told plaintiff he was going away and would be back at a certain time or near a certain time, when he would be ready to negotiate further with plaintiff, and that they would have no trouble about agreeing on the price and that he, Miller,

would buy plaintiff's stock. Plaintiff then went to T. J. Jones and informed him what Miller had said, and that Miller would be back to Boise with the money to buy their stock, and what he had said regarding the merger, and that plaintiff wanted Jones to negotiate with Miller for him, and that they, plaintiff and Jones, would sell together, that Miller wished to buy both their holdings together. Within a day or two after this talk with Miller, plaintiff went to his home at 5767 Shafter Avenue, Oakland, California, and was there continuously between November 30, 1917, and shortly after the first of February, 1918, excepting little drives out into the country. He never received any telegram from Mr. T. J. Jones and received nothing with reference to his bank stock. (Tr. pp. 56, 72-73.)

Mr. Miller returned to Boise from the East early in November, 1917. On November 30, 1917, he had a balance in the Idaho National Bank at the close of business, of $84,003.57, and his balance to and including December 4, 1917, was never less than $30,000; and he had already purchased large amounts of stock in that bank. (Tr. p. 92.)

On November 30, 1917, Miller had a talk with Mr. T. J. Jones with reference to purchasing plaintiff's 50 shares and Jones' 15 shares, and offered $90.00 per share. The final negotiations took place in the evening of that day at the bank. Mr. Miller, Mr. Jones and Miss Nellie Wilson, bookkeeper and stenographer for the bank, were present. Mr. Jones

informed Miller that there was no use discussing the purchase of the stock unless he had the money to pay for it, a cash transaction. Miller referred Jones to the bank books and to Miss Wilson. Jones asked Miss Wilson, and she informed Jones that Miller had the money to buy plaintiff's and Jones' stock. She said: "Sell. He has got money enough here to take care of any check that he will issue for you." (Tr. pp. 58-59.)

Jones then drafted in pencil a telegram to plaintiff, and had it typed in triplicate by Miss Wilson and submitted it to Miller. Miller wrote the word "Answer" at the end with a pen. (Tr. p. 59, and testimony of Miss Wilson, p. 95.)

The telegram, which was an unrepeated message, was as follows:

"November 30, 1917.

"J. A. CZIZEK,
5767 Shafter Avenue,
Oakland, Calif.

"Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait (here) year and chances of liquidation says if fails to get two-thirds stock liquidation will follow will you take ninety dollars per share for yours I am inclined to accept offer for mine. Answer.

T. J. JONES."

Mr. Jones gave one copy to Miller, one copy to his son and law partner, Felix Jones, and put the other in his safe. At his direction, his son Felix took the telegram to the defendant's office in Boise and de-

livered it to the operator there, and prepaid the charges, and directed the operator, who stamped it, to send it to plaintiff at Oakland. (Tr. p. 85.) The following day Mr. Felix Jones, at the request of his father, went to the telegraph office and inquired if there was a message there for Jones. He was informed that there was none. He then asked the operator to look through and see if a telegram had been sent to J. A. Czizek at Oakland. The operator looked through some papers and files, and said the telegram had been sent. On the day following, or the subsequent day, Mr. Felix Jones again went to the telegraph office and inquired if the telegram had been sent to Czizek, at which they looked through some more files and replied that J. A. Czizek had received the telegram, whereupon Mr. Jones left the telegraph office. (Tr. pp. 85-88.)

The message wholly failed in transmission and was consequently never received by plaintiff, who at that time was at his home at No. 5767 Shafter Avenue, Oakland, and who testified that if he had received the telegram he would have sold his stock; that he was seeking to sell it, and that he would have accepted the offer and would have wired a reply of acceptance. (Tr. pp. 73-75.) Mr. T. J. Jones, not hearing from plaintiff and believing that he had received the telegram and was either on his way to Boise or did not wish to sell, sold his 15 shares of stock to Miller at $90.00 per share and received the full cash price therefor of $1350. (Tr. p. 64.)

The plaintiff did not learn of the message or the offer to buy his stock until his return to Boise, about the middle of February, 1918, or about 75 days thereafter. Meanwhile the Idaho National Bank had gone into liquidation and plaintiff's stock had become valueless, and has ever since remained so. (Tr. p. 93.) When plaintiff returned to Boise, he and Mr. T. J. Jones called upon Mr. Hackett, defendant's manager of its Boise office. (Tr. pp. 64-65.) Mr. Hackett promised to investigate and under date of February 14, 1918, sent a letter to Mr. T. J. Jones acknowledging that the message had failed in transmission and enclosing a check for the amount paid as tolls. This letter is found on page 66 of the transcript. Mr. Jones returned the check by letter, dated February 18, 1918, refusing to accept it on the ground that such acceptance might be construed as a settlement of the matter. This letter is found on page 67 of the transcript.

Mr. Hackett then took up with Mr. Jones the matter of settlement of the damages incurred by plaintiff by reason of the failure to send the message, and said among other things: "It is unfortunate that it didn't go through, and the company will settle it. There is no question about their liability." That "the amount that Czizek would be entitled to would be the difference between the value of the stock and the amount Miller offered. Isn't that correct?" (Tr. 67-70.) After further negotions which are set forth in the transcript, Mr. Hackett requested Mr. Jones

to fix the value of the stock, as he thought Mr. Jones would be fair, and stated that he, Hackett, had taken the matter up with the company. (Tr. p. 70.)

Afterwards plaintiff received a communication from the defendant, either an agent or attorney of defendant or somebody from Salt Lake. At the suggestion of Mr. Hackett, plaintiff drafted a formal claim against the defendant for $4,500 damages, and gave it to Mr. Hackett, who acknowledged its receipt by letter (Tr. p. 82), in which he again inquired about the value of the stock. Mr. Hackett forwarded the claim to the district commercial superintendent of defendant at Salt Lake. This claim was dated June 18, 1918, and is found in full on pages 78-79 of the transcript.

Mr. Life, the district superintendent, acknowledged receipt of the claim under date of July 2, 1918, advising that the matter had been taken under immediate investigation, upon conclusion of which plaintiff would be communicated with further. He also informed plaintiff that, more than 60 days having elapsed since the message was filed, the investigation would be conducted without prejudice to the satuation created by plaintiff's failure to bring the matter to their attention at an earlier date. This letter is found on page 81 of the transcript.

Plaintiff waited a reasonable length of time, and having heard nothing further in relation to the matter, commenced this action in a State Court at Boise, on the 13th day of June, 1919.

The case was removed by defendant to the United States District Court, on the alleged ground of diverse citizenship, it being claimed that plaintiff at the time the action was commenced was a citizen and resident of Idaho, while it is conceded that defendant corporation is a citizen of New York.

Plaintiff in due time, appearing specially for that purpose, filed a motion to remand to the State Court on the ground that at the time the action was commenced, and ever since, plaintiff was a citizen and resident of California, and that consequently the Federal Court had no jurisdiction, since the district of Idaho was neither the residence of the plaintiff or defendant and the action could not have originally been brought in the Federal Court in Idaho. The issue of plaintiff's residence was tried wholly upon affidavits, all of which are in the record, as certified to by the Court below. (Tr. p. 54.)

The motion to remand was denied by an order dated October 10, 1919. After the conclusion of the arguments, plaintiff's attorney asked leave to make a further showing as to the residence and citizenship of plaintiff at the time the action was commenced, which was denied by the Court, to all of which an exception was allowed. (Tr. pp. 54-55.)

Defendant thereafter filed an answer denying upon information and belief some of the allegations of the complaint and admitting others. Among those admitted are the presentation of the message on November 30, 1917, by T. J. Jones to defendant, and

the receipt and acceptance thereof by defendant and the payment by Jones of the regular toll or charges therefor. (Tr. pp. 15-16.) The answer also admits that about the middle of February, 1918, plaintiff and T. J. Jones called at defendant's office in Boise, and were informed that the message had never been sent to plaintiff, and it also admits the sending by defendant to T. J. Jones of the letter above referred to, dated February 14, 1918, acknowledging that the message failed in transmission. (Tr. pp. 18-19.)

The answer sets forth no allegations showing any reason why the telegram was not sent, and offers no excuse or explanation whatever for such failure.

The answer contains special defenses based upon three of the printed conditions on the back of the telegraph blank, relating to repeated and specially valued messages, and filing of written claim within 60 days, which will be hereafter discussed in detail.

The only evidence offered on behalf of defendant was a duplicate copy of the message in question, being the one filed for transmission and identical with the one above set forth, except that it contained the original pencil notations made by the receiving operator, "M B" and "49 pd. nl", in the upper right hand corner, and "454 Yates B." and "65c, 408-W" in the lower right hand corner, which are the office building number and telephone number of the sender, T. J. Jones, and the charges paid. It also shows the printed conditions relied upon as defenses, together with a certificate of the secretary of the

Interstate Commerce Commission that the attached is a true copy of form of telegraph blank filed by the defendant with the commission on February 20, 1917. (Tr. pp. 97-104.) A certified copy of the rules of the company on file with the commission was also introduced as Exhibit C.

The defendant also called Mr. Flora, present manager of the defendant at Boise, to testify as to the different methods of handling repeated and unrepeated messages. (Tr. pp. 106-107.) The witness testified that the only difference in the handling of unrepeated messages and repeated and valued messages is that the former is accepted over the counter, counted, initialed by the clerk handling, timed by an automatic clock and hung on the hook provided for that purpose, to take its turn with other telegrams, while the repeated and valued telegrams are given the same handling up to the point that they are given directly to the operator for transmission and not hung on the hook with the average class of unrepeated messages. The repeated telegram is repeated back for accuracy. On cross-examination he testified that the difference in handling the two classes of messages, is that the repeated message has the two words "repeat back", written immediately after the check. The first thing done with either is to count them, then they are both initialed and timed and both classes are handled the same up to that point.

Thereupon defendant rested.

During the progress of the trial the Court reserved his rulings on many of the objections to the testimony, going to the merits of the case, and suggested that these matters be taken up on final argument. At the conclusion of the testimony, the time for oral argument being limited, the Court made an order that, in lieu of oral argument, written briefs be filed and served by each side within certain specified times, which was done. (Tr. p. 107.)

At the commencement of the trial the Court also made an order that all adverse rulings of the Court should be deemed excepted to. (Tr. p. 55.) While no specific request was made to the Court for special findings, since the case was submitted on written briefs without oral argument. the contentions of both sides were fully set forth in the briefs, and there was no dispute as to the facts.

The Court filed its written decision and conceded practically all of the facts as outlined above, but decided as a proposition of law that plaintiff was not entitled to recover, and in so doing overruled many of the objections seasonably raised at the time of the trial by plaintiff, and allowed exceptions, all of which are embodied in the bill of exceptions.

Judgment for defendant was entered on May 11, 1920, and on June 5, 1920, within the 30 days allowed by rule 75 of the District Court, quoted on page 112 of transcript, plaintiff filed his petition for a new trial (Tr. pp. 112-116), which came on for hearing June 17, 1920, and after argument was

overruled by the Court on the same day. Plaintiff then moved the Court for an extension of time of 20 days or until July 8, 1920, within which to file and serve plaintiff's proposed bill of exceptions, which motion was argued by counsel for both sides. Rule 76 (Tr. pp. 120-121) provides for filing proposed bill of exceptions within 10 days after written notice of the decision. The Court considered the fact of the pendency of the motion for new trial and on June 17, 1920, a day of the regular term at which the case was tried, made an order extending plaintiff's time for filing and serving his proposed bill of exceptions to and until July 8, 1920. (Tr. pp. 116-117.)

The bill of exceptions was filed and served on July 2, 1920, and settled and allowed by the Court on July 16, 1920 (Tr. p. 122), and embraces all of the testimony and a statement of all the evidence introduced and offered at the trial. (Tr. p. 112.)

On July 12, 1920, defendant filed a motion to strike the proposed bill of exceptions from the files, and also the portion thereof relating to the proceedings on the motion to remand. (Tr. pp. 117-120.) The Court denied the motion to strike the entire bill of exceptions, but sustained the motion to strike the portion relating to the motion to remand, on the ground that these proceedings were not had at the same term at which the case was tried, to which ruling plaintiff was allowed an exception. (Tr. p. 120.) The record, however, shows that all the evi-

dence before the Court on the motion to remand is included in the transcript. (Tr. pp. 54 and 120.)

SPECIFICATIONS OF ERROR.

The assignments of error set forth in full on pages 124-126 of transcript, and which are intended to be urged and relied upon in this Court, for purposes of brevity and convenience, will be grouped and considered in the following order:

1. The Court erred in denying the motion of the plaintiff in error to remand said cause to the District Court of the Third judicial district of the State of Idaho, in and for the county of Ada, and in entering its order dated the 10th day of October, 1919, denying said motion to remand, and in denying the application of plaintiff in error to make a further showing as to his residence and citizenship at the time said action was commenced and since that time, and in sustaining defendant's motion to strike from the bill of exceptions that portion thereof relating to the motion to remand.

2. Since the Court held that the clause on the telegraph blank providing that the claim for damages must be presented in writing within 60 days after the telegram is filed with the company for transmission did not apply to plaintiff in this case because he did not learn of the failure to transmit until after that period, it was error for the Court to hold that the claim should have been presented in writing within 60 days after plaintiff first learned that fact,

and to hold that the presentation of such claim in writing and within that time, was not waived by the defendant, since plaintiff, upon learning the facts, immediately notified defendant, who took up the matter for complete investigation, and plaintiff at once filed the claim in writing as soon as directed to do so by defendant.

3. The Court erred in not holding that the unexplained failure to transmit the message by defendant, and its false statements to the sender that the message had been sent and delivered to plaintiff at Oakland, constituted negligence of such a character that it was not within the intent and meaning of the conditions and limitations of the contract relating to unrepeated and specially valued messages, and that such conditions were not a defense in this case, and in holding that there was nothing unusual on the face of the telegram to impress defendant with its importance.

4. The Court erred in holding that the evidence did not show that plaintiff was damaged by defendant's failure to send the telegram since he might not have accepted it and might not have been able, at that time, to have obtained his stock for the purpose of selling it.

5. The Court erred in entering judgment in favor of defendant and against plaintiff for costs.

ARGUMENT.

I.

The Court below was without jurisdiction.

With reference to the first assignment of errors, if the question of urging it this time rested entirely with counsel for plaintiff, his inclination would be not to insist upon it, as he feels that plaintiff would be safe in standing upon the merits of the remaining specifications of error and would thereby secure speedier justice than if the case were remanded to the State Court, but in deference to the plaintiff, who feels that the showing made by him as to his residence was so conclusive that it should not have been disregarded by the Court below, it would seem to be our duty to plaintiff to urge it at the outset. While the Court below sustained the motion to strike this part of the bill of excepions, we, nevertheless, believe that the record is in such shape that it should be considered by this Court, for the following reasons:

The motion to remand was heard entirely upon affidavits, and the Court below has twice certified that the record contains all the evidence before the Court used on this motion. On page 54 it is stated, "The foregoing affidavits constitute all the evidence before the Court used upon said motion to remand." On page 120 is the following statement: "The affidavits and papers relating to the motion to remand as set forth in the foregoing bill of exceptions, were all of the affidavits and evidence before the Court on the motion to remand."

In the order denying the motion to remand on page 54, it was ordered that plaintiff be allowed an exception to such ruling. On page 55 an exception was also allowed plaintiff to the refusal of the Court to permit a further showing as to plaintiff's residence and citizenship. Thus we have in the record all of the evidence used below in the hearing, properly certified, with timely and proper exceptions to the rulings. It seems to us that regardless of the technical question as to whether it was properly incorporated in the bill of exceptions or not, it may properly be considered by the Court as within the intent and spirit of the amendment of February 26, 1919, to Section 269 of the Judiciary Code, which is as follows:

> "Sec. 269. All of the said Courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the Courts of Law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the Court shall give judgment after an examination of the entire record before the Court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

If our position in this is correct, we respectfully call the Court's attention to the verified motion to remand, commencing on page 45, and the affadivits following of responsible and disinterested witnesses, all of whom testified that on June 13, 1919, when the action was commenced, plaintiff was and ever since has been a resident and citizen of California. The

only showing made by defendant was that plaintiff had been a registered voter at Warren, Idaho, where his mines were located, in 1916 and 1918, and voted there at the elections in those years, and that plaintiff had registered at a Boise hotel from Warren, Idaho, in June and July, 1919. There was also a certificate from the Secretary of State that plaintiff held the office of Commissioner of Immigration, Labor and Statistics for the State of Idaho from January 25, 1915 to January 25, 1917. This was the extent of the proof submitted by defendant.

The question related to the specific date on which the action was commenced, which was June 13, 1919. The evidence offered by defendant did not touch this date, except that relating to the registration at the hotel, which could not be considered of any weight as bearing upon the question of the legal domicile of a party, since it is a common practice for persons to register from the last place from which they arrive. That plaintiff should have registered from Warren, would signify nothing in that respect, because his mining interests in Idaho were located there and while temporarily in the State looking after those interests he would spend his time at Warren. The fact is much more significant that, although he had previously held office and been a voter in Idaho, after the State election in November, 1918, he refused to serve any longer as a member of the county central committee in Idaho county, on the ground that he was no longer a legal resident of the State of Idaho,

and that his home and legal residence were in the State of California. (Affidavit of Roden, Tr. p. 50.)

It would therefore seem conclusive that immediately after the election in November, 1918, plaintiff definitely decided upon the step which he had previously contemplated, of making his legal residence and domicile in California. He had previously bought a home there, where his wife and son were living, the former greatly benefited in health by the change, and the latter attending the schools of California. The verified complaint filed in the State Court, when there was no thought of the question of domicile arising, recited in the third allegation (Tr. p. 8), that plaintiff was about to leave Boise for his home in Oakland, California, and again at the end of the same allegation and in the fourth allegation. The proof also shows that plaintiff spent most of his time at his home in Oakland. We are at a loss to understand how the Court, on this evidence, could decide, as a matter of fact, that on June 13, 1919, plaintiff was a legal resident of Idaho. Without further considering the affidavits in detail, we respectfully and earnestly request this Court to read the evidence found in the record on this point, from pages 45 to 54, inclusive.

II.

The 60-Day Clause.

On this point we respectfully present two distinct points for consideration:

1. There is no provision requiring the presentation of a claim in writing within any specific time after plaintiff learns of defendant's default.

2. Both the time and manner of presenting the claim were waived by defendant.

1. It is conceded by the Court in his decision (Tr. p. 38), that this clause requiring claims for damages to be presented in writing within 60 days "after the telegram is filed with the company for transmission", would have to be held unreasonable in this case, for the parties concerned were wholly ignorant of defendant's failure to transmit the message until after the expiration of that time.

The Court held, however, that this period of limitation began to run when plaintiff learned of the default, and that he had 60 days thereafter in which to present his claim. The Court states that he does not find that the precise point has been passed upon, but that such seems to be the view implied in two cases, one of which was decided by this Court, to both of which we will hereafter refer. It should be noted, first of all, that the defendant's answer does not raise the latter issue. The defense relating to the 60-day clause is the second separate defense on pages 20-22 of the transcript, and merely sets up the defense: "That no claim in writing was presented to defendant within 60 days after the telegram was filed with defendant for transmission, or at any time or at all, except on or about the 18th day of June, 1918."

This would seem to be the extent to which this clause could operate as a defense, since it does not provide that the claim must be filed within 60 days after the party first learns of the mistake or failure to transmit, or within a reasonable time thereafter, as is provided, for example, in the bills of lading of carriers.

As the contract in the case at bar makes no provision as to the time for the presentation of a claim after the party first learns of the default, it might perhaps with reason be contended that the party would have a reasonable time thereafter, in view of all the circumstances of the case, within which to present his claim. There would seem to be no basis for holding that such time should be 60 days or any other specific time. This amounts to adding to the contract something which is not there. The limitation is for the benefit of defendant and of its own creation. It has no right, therefore, to ask that the contract be extended for its own benefit and for the purpose of declaring plaintiff in default, beyond the letter of the instrument, especially where the defendant itself has so wholly failed in its duty to plaintiff.

On this question, in the case of Western Union Telegraph Company v. Way, 83 Ala. 542, 4 So. 844, the Court on page 849, said:

> "The limitation as to the time when a claim for damages must be presented is in the nature of a condition subsequent, the non-performance of which operates a forfeiture of all damages.

> A condition operating as a forfeiture, not being favored, will not be extended beyond the express or clearly implied terms."

In Western Union Co. v. Yopst, 118 Ind. 248; 20 N. E. 222; 3 L. R. A. 224, the Court on page 227 of the N. E., said:

> "There is no valid reason why the words of the contract should be extended in favor of the company to cases which they do not embrace. The limitation is for the benefit of the company, and is of its own creation. It has no right, therefore, to ask that the contract be extended for its own benefit beyond the letter of the instrument. Nor is there any ambiguity in the language employed, for it clearly designates the cases in which the limitation shall apply. The company is invested with comprehensive powers and rights, and is by law charged with duties to the public in consideration of the rights and franchises granted to it. It is impressed with a public character, and its duties are similar in many respects to those of a common carrier. Hackett v. State, 105 Ind. 250; 5 N. E. 178.
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> "It ought not, therefore, to be permitted to successfully insist that a limitation of its own creation, and established for its own benefit, should be extended beyond the words creating the limitation."

The Court below cited the case of Postal Tel. Cable Co. v. Nichols, 159 Fed. 643, decided by this Court, as seeming to support the view that the claim must be presented within 60 days after plaintiff learned of the default. We respectfully submit, however, that this Court did not so hold. The clause on the

telegraph blank was the same as in this case. After quoting it, on page 647, the Court said:

> "The message was not repeated, the delay occurred upon a connecting line, and no claim for damages was presented in writing within 60 days after the message was filed with the company for transmission."

The Court goes on to show that defendant was guilty of gross negligence in not notifying the sender of the break in its line, against which it could not contract, which applies also to this case. The only other reference to the 60-day clause is found in the concluding paragraph of the opinion. The telegram was filed for transmission on June 12, 1903, the senders had knowledge of the failure to transmit on July 11, following, and filed their claim for damages on August 17, 1903, or after the 60-day period had expired, and the Court held that they were entitled to recover. This case is stronger for plaintiff than that case because there the senders knew on July 11, 1903, which was well within the 60-day period, of the non-delivery, and still had a full month within which to file their claim before the expiration of the 60-day period. Here plaintiff's knowledge was not acquired until long after the 60-day period had expired. We find no language in the Nichols case which can be construed as holding that the claim must be presented within 60 days after knowledge of the defendant's negligence.

In Western Union Tel. Co. v. Lee (Ky), 192 S. W.

70, the only other case cited by the Court below, the same condition exists as in the Nichols case. All that is said by the Court on this question is found in the last paragraph on page 75, as follows:

> "The plea that there can be no recovery because the plaintiff failed to present a claim, in writing, within 60 days after the telegram was filed with the company for transmission, cannot avail. The telegram was sent on March 3, 1915, and this action was filed on May 14, 1915. But plaintiff did not know the telegram had not been sent to him until March 26, 1915, and, of course, could not be expected to give notice of something he did not know. The suit was filed within 60 days after plaintiff learned of the company's default, and constituted a sufficient written notice of the plaintiff's claim."

The precise question arose in the case of

Larsen v. Postal Tel. Cable Co., 150 Iowa 748; 130 N. W. 813, where the telegram was dated May 12, 1906, but was never delivered and the addressee did not learn the facts until some time in June, 1906. No claim in writing was filed until January 31, 1907. The question arose under a statute of Iowa which provided that no action could be maintained against a telegraph company for the recovery of such damages unless a claim therefor is presented in writing to such company within 60 days from time cause of action accrues. Although this provision was in a State statute, the reasoning on this point applies with equal force to this case. The Court said:

"If a message is erroneously transmitted or there is an actual delivery, though unreasonably delayed, the addressee receives the communication and is informed therefrom of the mistake or negligence of the company, and under such circumstances it is no hardship to require him to present his claim within such reasonable time as the legislature may require, in order that it may investigate while the facts are fresh, and remedy the irregularity, if any existing, in the interest of the service. But in the case of non-delivery, the addressee ordinarily is not aware of the existence of the message. Only the sender and the company may know of this until long after the 60 days prescribed have elapsed, and it would seem unjust to deprive him of all remedy, in the absence of any fault on his part. Only the carrier may be aware of the non-delivery, and it ought not to be permitted to escape liability for negligence by according to this statute a meaning which would extend its scope beyond relief for the mischief intended. As there was no delivery, the omission cannot be construed as a mere delay, and plaintiff was not required to present his claim to the company before beginning the action."

2. The evidence clearly shows that it was with the consent and at the express direction of defendant that plaintiff filed the claim on June 18, 1918, and that the matter had been under investigation by the defendant ever since plaintiff and T. J. Jones called it to defendant's attention, about February 15, 1918. The defendant accepted without objections the oral notice of the claim for damages made to its Boise manager by plaintiff at that time. Mr. Hackett

promised to investigate it and almost immediately took up the matter of settlement of the claim. When Mr. Jones, after consulting with plaintiff, returned the 65 cents toll to Mr. Hackett, he informed him that he did so because an acceptance of it might be construed as a settlement of the matter. Thus defendant's manager at Boise was notified from the start of the claim that plaintiff was making, and the manager informed Mr. Jones that the company was liable and would settle and stated the basis upon which the company would settle, which was the difference between the value of the stock at that time, and what Miller offered for it. Mr. Hackett then attempted to ascertain whether the stock had any value, as the bank was then in liquidation. He said he had taken it up with the company and wanted Mr. Jones to fix the value of the stock as he thought he would be fair. This clearly left the impression that there was an understanding to that effect between Mr. Hackett and the company. In such case there could be no necessity for filing a written claim, as the company was already apprised of the situation and was negotiating a settlement and could not be prejudiced in any way, and there was nothing further for plaintiff to do but to await the result of Mr. Hackett's negotiations with the company. After a reasonable time had elapsed and nothing resulted in the way of settlement, and after plaintiff had received a communication from some one connected with the defendant at Salt Lake, Mr. Hackett, the

manager, suggested to plaintiff that he address a written communication to him at Boise. This was done by plaintiff on June 18, 1918, and in the letter he outlined the facts in detail. Mr. Hackett sent this letter on to the company, and wrote plaintiff under date of June 19, 1918, stating that he had done so, and again asked regarding the value of the stock. In his letter he said: "Am I to understand that the stock has no value at present? Was there not some value to the stock when you first discovered the message had not been sent about the middle of February when you returned to Boise?" (Tr. p. 82.) This is further evidence that plaintiff was justified in believing from the start that the matter of settlement was being considered by defendant, and no prejudice, injury or inconvenience could have resulted to defendant by plaintiff's failure to file the formal claim in writing at an earlier date.

We will now call attention to the reply to this letter from Mr. Life, district commercial superintendent at Salt Lake, on page 81 of the record, in which he states: "Beg to advise this matter has been taken under immediate investigation upon conclusion of which you will be communicated with further."

The remaining paragraph of the letter was construed by the Court below to mean that this promise to investigate was made without waiving the defense that the claim was barred by reason of plaintiff's failure to make demand within the period specified on the telegraph blank. (Tr. p. 35.) If such was

Mr. Life's intention, we think the language he employed fails to convey that meaning. Mr. Life also interprets this clause, as does the defendant in its answer, to mean nothing other than that the claim must be filed within the 60 days *from date message was filed*, which was impossible in this case. He then says the investigation will be conducted without prejudice to the situation created by plaintiff's failure to bring matter to their attention at an earlier date. The reasonable construction of this language in view of the situation at that time, would be that Mr. Life would investigate the matter regardless of the 60-day clause, and at the conclusion of the investigation communicate further with plaintiff. If he intended to ultimately urge this defense, what was the need of investigating at all? Fairness and good faith would seem to require of him that he either investigate the matter, and if he found the company at fault, recommend a settlement; or notify plaintiff at once that he considered the claim barred by the 60-day clause, so that plaintiff could take such further action as he might desire. Moreover, the statement in the letter with reference to the failure of plaintiff to bring the matter to their attention at an earlier date is untrue and self-serving, as the evidence conclusively shows that it was brought to their attention as soon as plaintiff learned of it, and had been under investigation and process of settlement ever since that time.

Mr. Life, even if so disposed, could not by an equivocal statement of that kind in his letter, set aside the legal effect of these prior transactions, as a waiver by defendant of this provision of the contract.

If Mr. Life intended in his letter to convey the meaning claimed for it, he might easily have made his meaning clear by a simple statement that their investigation would be conducted without waiving their rights, under that clause of the contract.

That a provision of this kind can be waived by the company, by such acts as are shown in this case, is abundantly established by the authorities.

It will be observed that while the business of telegraph companies has been brought within certain provisions of the Interstate Commerce Act and the commission is given power to fix reasonable rates and regulations, this case is not governed by the provisions of that act which relate to the liability of carriers of passengers and freight providing against discrimination as between shippers and time within which claims for damages or misdelivery must be presented and suit thereon commenced, commonly known as the Carmack Amendment of the Hepburn Bill (24 Stat. at L. 379, Chap. 104, as amended by the Act of June 29, 1906, 34 St. at L. 593, Chap 3591, Comp. St. 1913, Sec. 8592), and the decisions of the Supreme Court under that portion of the act have no application to this case. Such were the cases of Georgia F. & A. R. Co. v. Blish Milling Co., 241 U. S.

190, followed by this Court in Gooch v. Oregon Short L. R. Co., 264 F. 664, and the other cases against railway companies cited by the Court below on page 38 of the transcript. See also note L. R. A. 1916 D., p. 1049-1059.

This case is therefore governed by the rules of the common law relating to waiver.

The case of Wheelock v. Postal Cable Co., 196 Mass. 119; 83 N. E. 313, 314-15, is very similar as to the facts relating to waiver to this case. The telegram was never received by the addressee, and the plaintiffs had no knowledge of this fact until about six weeks after it was delivered to the company for transmission, and did not file their claim within the 60 days from the date the telegram was filed with the company. The provisions of the telegraph blank were the same as those in this case. When the plaintiffs learned that the telegram had not been delivered, they sent their clerk to the defendant's office, who saw the general manager and asked for an explanation. Within a few days he called once or twice more and was informed that nothing had been learned. Then the defendant's manager wrote plaintiffs a letter stating that they were investigating the service of the telegram, and that the investigation would be most thorough and the party at fault for any negligence would be promptly reprimanded, and that they would communicate further with plaintiffs. Ten days after this a representative of the defendant called at the plaintiffs' office and ten-

dered one of the firm the amount of the tolls for sending the message, stating that this was all that the defendant would do and asking for a receipt for the money. The plaintiffs refused to accept the money. No further communication was received from defendant until April 4th, which was about three months after the telegram had been filed with the company, when the defendant handed plaintiffs a letter dated April 3d written by the superintendent of defendant's claim department to defendant's general superintendent, which referred to plaintiffs' complaint in regard to the telegram and continued as follows:

> "Investigation shows that this message was promptly transmitted from originating station, but in view of the statement of the firm in Melbourne to whom it is said to have been intended, that they did not receive it, the tolls may be refunded to the sender. This would be the full extent of the liability of the company in whose hands the failure may be shown to have occurred."

Immediately afterwards the plaintiff consulted counsel for the first time in regard to the matter. On April 12th they sent the defendant a written claim for damages growing out of the loss of the message. On May 14th defendant sent to plaintiffs' counsel a letter written by its vice president to its general superintendent, referring to the letter of counsel in regard to the claim, and saying that the company had never received any claim from the

plaintiffs but had received an oral complaint about the message. The letter went on to state the facts in regard to the receipt of the message for transmission, and the result of the investigation, and the offer of the defendant to return the tolls to the sender. It ended with these words:

> "Of course we could not have favorably considered any other claim in the matter. Please advise the attorneys accordingly."

The Court first considers the question relating to that part of the contract which relieves the company from liability "where the claim is not presented in writing within 60 days after the filing of the message." The Court said:

> "Such a stipulation is a reasonable provision for the protection of the company against stale claims, and for securing an opportunity to investigate claims founded on an alleged breach of contract, or any negligence, before the facts pass out of the memory of those who ought to know them. The validity of this kind of requirement has been sustained by a great weight of authority."

The Court cites a large number of cases in support of this view. The Court continues:

> "It is contended by the plaintiffs that this requirement was waived by the defendant. Questions like that which arise on this contention have often been considered in suits upon policies of insurance. There was a series of communications between the parties touching the subject, in all of which, from first to last, the defendant

discussed the question of liability on its merits, and professed in the beginning to intend to deal with it, and finally to have dealt with it, in reference to rights created by other parts of the contract, apart from any question as to the formal presentation of a claim in writing. The defendant's conduct in regard to it was such as naturally to throw the plaintiffs off their guard, and it appears that they did not read this stipulation nor consult counsel about their claim until after the 60 days had expired. We think they naturally might infer from the defendant's conduct that the claim was to be considered and determined upon its merits, and that there was no intention to set up a formal or technical defense, founded on the time or manner of presenting the claim. We are of opinion that there was evidence for the jury on the question whether the defendant waived its right to rely upon this defense. Walker v. Lancashire Ins. Co., 188 Mass. 560, 75 N. E. 66; Graves v. Washington Marine Fire Ins. Co., 12 Allen, 391; Searle v. Dwelling House Ins. Co., 152 Mass. 263-265, 25 N. E. 290; Brown v. Henry, 172 Mass. 559-567, 52 N. E. 1073; Moore v. Wildey Casualty Co., 176 Mass. 418, 57 N. E. 673; Hill v. Western Union Telegraph Co., 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; Hays v. Western Union Telegraph Co., 70 S. C. 16, 48 S. E. 608, 67 L. R. A. 481, 106 Am. St. Rep. 731; Western Union Telegraph Co. v. Stratemeier, 6 Ind. App. 125-130, 32 N. E. 871."

In Western Union Tel. Co. v. Heathcoat, 149 Ala. 423, 43 So. 117, the Court, on this point, on page 120, said:

"While the defendant was entitled to have the claim for damages presented in writing within

> 60 days after the message was delivered for transmission, we think there is no doubt that the right is a limitation for the benefit of the defendant, is of its own creation, and may be waived by it, and the waiver may rest in parol. 27 Am. & Eng. Ency. Law (2d Ed.) p. 1049; Hill v. Western Union Tel. Co., 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; 1 Elliott on Ev. 596."

On the question of the authority of the local agent in charge of the company's office to waive presentation of the claim in writing, the Court, on the same page, said:

> "Another insistence of the appellant is that the agent at Birmingham (Williams), to whom it is claimed by plaintiff the oral claim for damages was presented, had no authority to waive presentation of the claim in writing. Williams testified he had no authority to waive any of the rules or regulations on the back of the blanks, and that he had no authority to change any of the rules of the company. But he also testified that he was at the time general manager of defendant's local office at Birmingham, and head man there, and in charge of the company's business there. Notwithstanding the testimony of the agent that he was without authority, he was a general agent. It was his duty to transact generally the telegraphic business at Birmingham. There is no evidence tending to show that plaintiff, or her agent who was representing her, knew of any limitation imposed by the defendant upon the authority of Williams. If the jury should find from the evidence there was a waiver by Williams of a written presentation of the claim, the defendant would be bound by his acts in this respect. Western

> Union Tel. Co. v. Cunningham, 99 Ala. 314, 14 South 579; Syndicate Insurance Co. v. Catchings, 104 Ala. 176, 16 South 46; Western Union Tel. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480; Hill v. Western Union, 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; 27 Am. & Eng. Ency. Law (2d Ed.) 1048, and cases collected in note 13."

In the case of Hill v. Western Union Tel. Co., 85 Ga. 425, 11 S. E. 874, the Court held that in ordinary cases the provision relating to the presentation of the claim in writing within 60 days is reasonable and valid, and also held:

> "The agent or manager of the company on duty at the station from which the message is sent, is a proper person upon whom to make demand for the damages claimed, and he is competent to recognize and act upon an oral demand and thus waive any writing. Such a waiver will result from his refusal to pay, upon the sole ground that the company was not to blame."

In Western Union Tel. Co. v. Stratemeier (Ind. App.) 32 N. E. 871, the Court, on the question of waiver, on page 872, said:

> "The condition in the contract requiring the claim for damages to be presented in writing within 60 days is reasonable and valid, and is a condition precedent to a right to recover; but like all other conditions, the breach of which may defeat substantial rights, it should be strictly construed, and is subject to be waived. That condition was evidently designed to furnish appellant with reliable information respecting the claim for damages, to enable it to investigate the subject while the facts were

fresh and readily accessible; and it had the unquestioned right to insist upon the literal fulfillment of the condition before giving attention to the claim. Telegraph Co. v. Trumbull, 1 Ind. App. 121, 27 N. E. Rep. 313. But it appears from the pleading under consideration that appellant acted upon an oral presentation of the claim, and investigated the matter. Upon such presentation, it entered into a correspondence with appellee concerning the claim, and offered him money in settlement of his damages; thus recognizing a liability without demanding of him the performance of the condition. Having entered upon the investigation of the claim upon appellee's oral complaint, he might well have presumed appellant would ask him for further and more accurate information, if it had been desired. In the case of Hill v. Telegraph Co., 85 Ga. 425, 11 S. E. Rep. 874, the message was sent under the same kind of a contract, and the plaintiff made an oral complaint to the company's agent within three weeks after the message was sent. The agent told him to wait, and the matter would be investigated. About two weeks thereafter the agent informed the plaintiff that the company was not liable, and would not pay the claim. It was held that the condition requiring the claim to be presented in writing was waived. In the course of the opinion the Court said: 'The agent was not bound to recognize an oral demand. But if he did so, making no objection to it on the ground that it was not in writing, we think it was sufficient.' In the case of Massengale v. Telegraph Co., 17 Mo. App. 257, it was held that the promise of the general agent of the company to 'look into the matter' upon an oral demand by the plaintiff did not amount to a waiver of the condition requiring the demand to be in writing. Prof. Thompson,

in his work on the Law of Electricity (section 262) says that the conclusion was reached in that case upon 'questionable grounds.' The doctrine of the Georgia case is supported by the principles governing similar conditions in other classes of contracts, and it meets with the unqualified approval of this Court. Haven v. Insurance Co., 111 Ind. 90, 12 N. E. Rep. 137; Insurance Co. v. Marple, 1 Ind. App. 411, 27 N. E. Rep. 633. In accordance with these observations, it must be held that the facts contained in the reply in question constituted a waiver of the condition requiring the claim to be presented in writing."

In Hays & Bro. v. Western Union Tel. Co., 70 S. C. 16, 48 S. E. 608, the Court held:

"Where a blank used in sending telegrams provides that a claim for damages must be made in writing within 60 days, a waiver of the condition may be shown by acts of the company's agent in accepting verbal statements as to damage, and seeking information of plaintiffs as to the merits of their claim, within the time limited by the blank."

In Western Union Tel. Co. v. Fitts (Ga.), 79 S. E. 156, the Court held:

"The evidence was sufficient to show a waiver of the condition of the contract printed upon the telegraph blank, which requires the claim for damages to be presented in writing. The testimony that the telegraph company received an oral demand, and within a week after the message was sent acted upon it and investigated the claim, is undisputed."

"And though the agent is not bound to recog-

nize an oral demand, if he does so, making no objection upon the ground that it is not in writing, a waiver of the written demand will result."

The Court further held that after this waiver,

"The company was not restored to its original right to insist upon a written claim for damages merely because, after the expiration of the 60 days, the sender's attorney transmitted to the telegraph company a claim in writing in which the damages were specifically set forth and enumerated."

The decisions of the Courts are more numerous with reference to the waiver of provisions in insurance policies which provide that the non-payment of a premium, in case of life insurance policies, on the date when due, will render the policy void and non-enforceable; and in case of fire insurance policies where it is provided that the insured shall furnish sworn proofs of loss within 60 days after the fire.

In the case of Insurance Co. v. Norton, 96 U. S. 234, the Court held:

"An insurance company may waive any condition of a policy inserted therein for its benefit.

"As the company may at any time at its option give authority to its agents to make agreements or to waive forfeiture, it is not bound to act upon the declaration in its policy that they have no such authority.

"Whether it has or has not exercised that option is a fact provable by either written evidence or by parol."

In the case of Insurance Co. v. Eggleston, 96 U. S. 572, 577, the Court said:

> "We have recently, in the case of Insurance Co. v. Norton (*supra*, p. 234), shown that forfeitures are not favored in the law, and that Courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted. Any agreement, declaration or course of action on the part of an insurance company, which leads the party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract."

The same ruling was followed in

Hartford Life Insurance Co. v. Unsell, 144 U. S. 439, and by the Circuit Court of Appeals of the Fifth circuit in

Talbot v. Metropolitan Life Insurance Co., 142 Fed. 694.

In McCullough v. Home Ins. Co., 155 Cal. 659; 102 Pac. 914, which was an action on a fire insurance policy which contained the usual clause requiring the insured to furnish sworn proofs of loss within 60 days after the fire, which was not done, the Court held that this requirement was waived where the plaintiff gave verbal notice to the agent within a few days after the fire, and the company proceeded to investigate the loss, and no denial of liability was

made by the company until more than 60 days had elapsed from the time of the fire.

The Court held that this was the law, regardless of the clause of the policy providing that no officer, agent or other representative of the company should have power to waive any condition of the policy, except such as may be endorsed thereon or added thereto, and regardless of the further fact that plaintiff had signed a "non-waiver agreement" during the pendency of the negotiations, which paper provided that any action taken by the company in investigating the cause of fire and the amount of loss and damage, should not waive or invalidate any of the conditions of the policy.

See also Fireman's Fund Ins. Co. v. Norwood (C. C. A. 8th Cir.), 69 Fed. 71.

This rule is followed uniformly by the Federal and State Courts.

Even in the case of Georgia F. & A. Ry. v. Blish Co., 241 U. S. 190, which was decided specifically under the Carmack Amendment relating to carriers and shippers of goods, the Court, on page 198, held that a formal notice of the claim for loss was not necessary, and that a substantial compliance with the rule was sufficient, where it apprised the carrier of the character of the claim, although it was not strictly accurate and no prejudice resulted. The Court said:

> "Granting that the stipulation is applicable and valid, it does not require documents in a

> particular form. It is addressed to a practical exigency, and it is to be construed in a practical way. The stipulation required that the claim should be made in writing, but a telegram which in itself or taken with other telegrams contained an adequate statement must be deemed to satisfy this requirement." (Citing cases.)

As pointed out above, there is nothing in the Acts of Congress disabling the defendant from waiving this provision of the contract.

We therefore respectfully submit that the 60-day clause was not a defense to the action, for the following reasons:

1. As held by the Court below, it would be unreasonable to apply this clause, because plaintiff had no knowledge of the facts until long after the 60 days had expired; and there is no provision requiring such claim in writing to be presented in any stated time after plaintiff first learns the facts, and there are no decisions of any Court to that effect.

2. If such a requirement were necessary, the filing of it in writing within that time was waived by defendant, because plaintiff, immediately upon learning the facts, notified the defendant through its manager, Hackett, who acknowledged such notice verbally and by letter, and at once began an investigation, and stated that he had taken it up with the company and that it would be settled; and the further fact that as soon as requested by defendant and at its suggestion, plaintiff presented a formal written claim, which was all that could reasonably

be required of plaintiff; and the defendant was not in any manner prejudiced by failure to receive this formal written claim at an earlier date.

III.

The remaining defenses, relating to unrepeated and specially valued messages, do not apply where defendant was guilty of gross or willful negligence.

We feel justified in the statement that from the evidence in this case the defendant was guilty of such negligence as amounts, to all intents and purposes, to fraud.

Its business was to send messages by telegraph, which is of a quasi-public nature, and it owed certain duties to the public, even in relation to ordinary, unrepeated telegrams. In this case it accepted the message for transmission, together with the regular charges therefor. Although the learned Judge who tried the case thought otherwise, we respectfully contend that the message, on its face, showed its importance, since it related to an offer of $90.00 per share for stock in a bank which might go into liquidation with a year's delay unless the offer were accepted, and a statement that liquidation would follow unless Miller got two-thirds of the stock, and requested an answer. It would seem to us that the importance of such a message would at once impress itself upon the mind of anyone engaged in the business of sending telegrams. The defendant not only failed to send the message at all, but when the sender

inquired about it within a day or two following, its agent looked through some files and papers, and told him that it had been sent; and when he again inquired, the agent again looked through some files and informed him that it had been delivered to plaintiff at Oakland. The conclusion is inevitable that the agent either willfully misrepresented the facts, or that the files and papers of defendant were kept in a grossly negligent manner. The latter assumption can hardly be accepted as an explanation of defendant's conduct, since it is hard to conceive how the papers and files could show that the message had been sent and actually delivered to plaintiff at Oakland. A more plausible explanation, perhaps, would seem to be that the defendant did not care to be bothered with the matter, and made those statements as the easiest way out of it. The Court is left in the dark as to the true reasons, because the defendant has never at any time offered the slightest explanation or excuse for its failure of duty. If these facts do not constitute gross and willful negligence of a company charged with a duty to the public, it would be difficult to imagine a more flagrant case of that nature. If the defendant is not liable in a case of this kind, then it has absolutely no duty or obligation with respect to an unrepeated message, and this class of service, in justice to the public, should be abolished. If such is the law, defendant can consign unrepeated messages to the waste basket with immun-

ity from all liability, except the toll paid for the message.

This, however, is not in accordance with the authorities, and we find no reported cases in which it is held that these provisions of the contract exempt a telegraph company from liability for what is ordinarily termed gross negligence. This Court, in

Western Union Telegraph Co. v. Lange, 248 Fed. 656, uses the following language on page 662:

> "We pass to the defenses based upon the stipulations upon the back of the message blank. It is pertinent to bear in mind that this action has little to do with any mistake in transmission of a telegraph message. The cause of action arises out of delay on the part of the telegraph company in transmission and delivery. Repetition of the message would have availed nothing, as no complaint is made that there was any mistake in the verbiage of the message. The legal duty of the telegraph company was to send the message with reasonable promptness at the regular rates and to deliver it. In Box v. Postal Telegraph Cable Co., 165 Fed. 138, 91 C. C. A. 172, 28 L. R. A. (N. S.) 566, the Court of Appeals for the Fifth circuit said that the regulation of the company with respect to repeated messages, while purporting to be made to guard against mistakes or delays, should be construed to refer to such mistake and delays as could be corrected or avoided by repetition and comparison; otherwise, a delay caused by the conduct of the company in negligently failing to send or to attempt to send the message would come within the rule. 'It is difficult,' said the Court, 'to believe that this stipulation was intended by the parties to be applicable to a case in which

the conduct of the company made it impossible for the message to be repeated.' As bearing upon the question we cite Purdom Naval Stores Co. v. Western Union Telegraph Co. (C. C.) 153 Fed. 327; Postal Telegraph Cable Co. v. Nichols, 159 Fed. 643, 89 C. C. A. 585, 19 L. R. A. (N. S.) 870, 14 Ann. Cas. 369; Pacific Postal Telegraph Co. v. Fleischner et al., 66 Fed. 899, 14 C. C. A. 166. Cases like Primrose v. Western Union Telegraph Co., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883, and Coit v. Western Union Telegraph Co., 130 Cal. 657, 63 Pac. 83, 53 L. R. A. 678, 80 Am. St. Rep. 153, and others cited, which involved mistakes in the language of messages sent, are not authority upon the point here presented."

The Court further said, on page 663:

"It is said that under no circumstances should the Court have found that the telegraph company was guilty of gross negligence in the delay in transmission and delivery. Again we must hold against the defendant. The facts show that the situation of the plaintiffs was in great detail explained to the defendant's agent at the time that the telegram was delivered at Oakland for transmission, and that plaintiffs did all that they were advised to do to insure immediate delivery of the message. But, notwithstanding their special efforts and the assurances of the telegraph company, there was a failure to deliver until more than three days had gone by. In our opinion, the circumstances proved gross negligence. Western Union Telegraph Co. v. Cook, 61 Fed. 624, 9 C. C. A. 680; Union Construction Co. v. Western Union Telegraph Co., 163 Cal. 298, 125 Pac. 242; Pierson v. Western Union Telegraph Co., 150 N. C. 559, 64 S. E.

577; Redington v. Pacific Postal Telegraph Co., 107 Cal. 317, 40 Pac. 432, 48 Am. St. Rep. 132."

In defendant's brief in the Court below, attention was called to the fact that this case was then pending in the Supreme Court on writ of certiorari, but the decision had not then been announced. In the opinion of that Court as reported in the advance sheets of 40 Sup. Ct. Rep. 460, the only point considered was the nature of the contract relating to the sale of the mining property referred to in the message, and the Court held that it was an agreement to sell and purchase, and not an option to purchase, so that no damages were incurred. It follows, therefore, that the other propositions of law as announced by this Court are sound, and are controlling and remain the law in this circuit. While the learned Judge stated that he deemed that decision controlling, it seems to us that he failed to follow it, for the principles there announced should apply with equal force to the remaining special defenses set up in the answer, and would entitle plaintiff to recover in this case.

In the earlier case of Western Union Telegraph Co. v. Cook, 61 Fed. 624, this doctrine relating to gross negligence was recognized by this Court. The Court there held that this was a question of general law, to be decided by the Federal Court, irrespective of the decision of the highest Courts of the State construing the statute. The Court, on page 628, said:

> "In the decisions of the Courts of the various States there is much conflict upon that question, some holding that such a stipulation is without consideration, and also void because against public policy; others, that, while not altogether invalid, it ought not to be held to exonerate the company from damages caused by defective instruments, or a want of skill or ordinary care on the part of its operators; and others, still, that it is a reasonable precaution, and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated for any cause except willful misconduct or gross negligence on the part of the company. Many of the cases will be found referred to in Hart v. Telegraph Co., *supra*, and in notes to the cases of White v. Telegraph Co., 14 Fed. 718, and Telegraph Co. v. Blanchard, 45 Am. Rep. 486."

Taking the line of authorities last mentioned which are most favorable to defendant, these clauses of the contract are no defense in case of gross negligence.

Again, in Pac. Postal Tel. Co. v. Fleischner, 66 Fed. 899, this Court had under consideration the question of how far a telegraph company could contract for exemption from gross negligence or fraud. The Court, on page 908, said:

> "Now a regulation which would take a telegraph contract out of the rules that apply to all other contracts ought not to be favored as a reasonable one, considering the circumstances under which many telegrams are sent. It has been claimed that the forcing a stipulation into a contract for the transmission of a message by a

telegraph company which would exempt it from liability for gross negligence should be considered as having been agreed to under a sort of moral duress, and therefore void. Much more should a stipulation forced into a contract by such a company which would exempt it from a liability for a fraud be declared void. The question of stipulations upon telegraphic blanks is fully discussed in 25 Am. & Eng. Enc. Law, pp. 790-798. The authorities there collected, I think, sustain the author in the view that any stipulation which would exempt a telegraph company from liability for its gross negligence is void. Other text writers sustain the same view. Gray, Commun. Tel. Par. 40; Thomp. Electr. Pars. 188-193. Many authorities might be collected to the same effect. The case of Primrose v. Telegraph Co., *supra*, does not establish a different doctrine. In that case the telegram was a cipher one. Neither its importance nor the purport was known to the company. There was a mistake in transmitting the same. The Court held that the regulation which required that such a message should be repeated was a reasonable one. But there was no holding in that case that the company, by any regulation, could exempt itself from liability for gross negligence or a fraud. The conclusion I have reached, therefore, is that, if the stipulation has the force claimed for it in this case by the plaintiff in error, it is void."

It is also true that there is nothing in the cases of Postal Tel. Co. v. Warren Godwin L. Co., 40 Sup. Ct. Rep. 69, and Western Union Tel. Co. v. Boegli, *ibid.*, 167, which in any respect holds otherwise, nor will any decisions be found which hold contrary to this

doctrine of gross negligence as laid down in the decisions of this Court.

In the Fleischner case the gross negligence, which the Court said amounted to fraud, consisted in the company's not informing plaintiff that its wires between Portland and Seattle were down, after it had accepted a message for transmission over that line. That was a case of silence on the part of the company, but in the case at bar the negligence is equally great, if not greater, because the defendant informed the sender that the message had been sent and delivered to plaintiff at Oakland, when such statement was absolutely false and a proper examination of its records must have disclosed this fact. The making of this false statement to the sender, who was acting on behalf of the plaintiff in the transaction, mislead him to such an extent that he considered it unnecessary to send plaintiff another message or to attempt to further communicate with him with reference to the sale of his stock.

Also, in the Nichols case, 159 Fed. 643, this Court again applied the doctrine of gross negligence, and held that provisions in the telegraph blank relieving the company from liability beyond the price charged, for non-delivery of unrepeated messages and for delays on connecting lines, are without effect where on receiving notice within a few minutes after undertaking to transmit an important message, if the lines are down, the company fails to notify the sender

of that fact. On this point this Court, on page 647, said:

> "We have no hesitation in holding it to have been gross neglect on its part, against which it could not contract, not to notify the senders of the break in the line and the consequent interruption in the transmission of the message, that they might have protected themselves by communicating directly with the War Department at Washington. See Fleischner v. Pacific Postal Telegraph Company (C. C.) 55 Fed. 738; Swan v. Western Union Telegraph Company, 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153; Western Union Telegraph Company v. Cook, 61 Fed. 624, 9 C. C. A. 680."

In Swan v. Western Union Tel. Co. (C. C. A., 7th Cir.), 129 Fed. 318, 67 L. R. A. 153 (and note), the Court followed and quoted from the decision of this Court in the Fleischner case. The message involved was addressed to plaintiff at Chicago, and sent by a mining engineer in Michigan advising plaintiff of a rich strike in the Mohawk Mine and advising him to make quick purchase of mining stock. There was such delay in the delivery of the message that meanwhile the Mohawk mining stock had risen in value and plaintiff was unable to purchase at as low a price as he could have purchased if the message had been promptly delivered. The Court held that it was gross negligence on the part of the company not to inform the sender of the wire trouble that delayed the message.

In Box v. Postal Telegraph Cable Co., 165 Fed.

138, the Court of Appeals of the Fifth circuit, on page 141, with reference to the clause relating to repeated messages, said:

> "The rule is not intended to secure a timely effort to send the message, but to make more certain its accurate transmission. The company is under obligation to send the message with reasonable promptness for the regular rate when it receives such rate and accepts the message. It could not, for example, willfully or negligently fail to send, or unreasonably delay the sending or attempting to send, the message, and defend on the plea that only the regular rate was paid and not the additional fee for repetition. The first lines of the rule show its meaning plainly:
>
> " 'To guard against mistakes or delays, the sender of the message should order it repeated; that is, telegraphed back to the originating office for comparison.'
>
> "The message must, of course, be sent before it can be repeated; it must be sent and repeated before any comparison could be made. Although the regulation purports to be made to guard against mistakes or delays, it should be construed to refer to such mistakes and delays as could be corrected or avoided by repetition and comparison; otherwise, a delay caused by the conduct of the company in negligently failing to send or to attempt to send the message would come within the rule. And it is held that it does not apply where 'no effort was made to put the message on its transit.' Birney v. N. Y. & W. P. Tel. Co., 18 Md. 341, 81 Am. Dec. 607."

Applying the reasoning of the Court in the case last cited in which it construes the language of the

clause, to other language found in the regulation, it will be observed that the language employed is that the company shall not be liable "for mistakes or delays in transmission or delivery, or for non-delivery." It says nothing about total failure to transmit or attempt to transmit. It uses the expression "non-delivery", but does not use the expression "non-transmission" but merely delays or mistakes in transmission. Obviously these expressions are not equivalent to "non-transmission", because the expression "mistakes or delays in the transmission" refers only to delays after the message has been started on the wires; and, moreover, as held in the cases cited, this clause cannot excuse silence on the part of the company in withholding information in its possession which would necessarily cause delay, and *a fortiori*, it cannot excuse affirmative false statements to the effect that the message has been sent and delivered.

In Purdom Naval Stores Co. v. Western Union Tel. Co., 153 Fed. 327, 332, the Court held that a rule of the telegraph company that it would not be liable for damages in case of an unrepeated massage was inapplicable where there was an utter failure to deliver the message at all, and distinguishes such a case from Primrose v. Western Union Tel. Co., 154 U. S. 1.

The case of Bowman & Bull v. Postal Tel. Co., a very recent case decided by the Supreme Court of Illinois, 124 N. E. 851, goes into a very complete

discussion of these questions. The Supreme Court, on March 1, 1920, refused a writ of certiorari in this case. See 40th Sup. Ct. Rep. 342. On page 858 of 124 N. E. the Court said:

> "Furthermore, we think the evidence here shows a degree of carelessness that amounts to gross negligence, and it is admitted that appellee would be liable for gross negligence."

Some of the rulings of the Court in this case are perhaps not in line with the decisions of the Supreme Court in the Warren-Godwin case, but we think that the writ of certiorari was denied on the ground of the gross negligence of the company, which shows that it is not the purpose of the Supreme Court to extend protection to a telegraph company, under these clauses, to cases of gross negligence.

The same rule is followed in Western Union Telegraph Co. v. Dorrough (Tex. Civ. App.), 213 S. W. 282.

In Lothian v. Western Union Tel. Co. (N. D.), 126 N. W. 621, the Court held that the non-delivery of a prepaid telegram was in itself gross negligence as a matter of law, in the absence of a showing on the part of the company of exculpatory facts, and that, while the liability of the company may be limited by the special contract, it cannot exonerate itself in anticipation thereof, from liability for its gross negligence, fraud or willful wrong. The court defined gross negligence as "Want of slight care and diligence", citing 29 Cyc. 423.

This term is defined by the Supreme Court in Preston v. Prather, 137 U. S. 604, 608-9, as nothing more than a failure to bestow the care which the property in its situation demands.

In Birney v. Printing Co., 18 Md. 341, 81 Am. Dec. 607, it was held that the exemption from liability for the non-transmission and non-delivery of unrepeated messages does not apply where no effort was made by the company to send the message. The Court said:

> "The terms of the notice in which exemption from liability is declared clearly imply an obligation on the part of the company to attempt the transmission and delivery of a message received by it for that purpose, and it would be most unreasonable to permit it to have the benefit of an exemption from liability without first bringing itself within the scope of the exemption provided for, by a full and faithful performance of its implied duties."

The rule in New York is stated in Pierce Co. v. Western Union Telegraph Co. (S. C.), 177 N. Y. Sup. 598, in the following language, on page 599:

> "This action is based upon gross negligence. It is alleged that the defendant failed to transmit a telegram, which had been delivered to one of its agents. This would constitute gross negligence as a matter of law. Weld v. Postal Tel. Cable Co., 210 N. Y. 59-77, 103 N. E. 957. Where the action is not based upon gross negligence, and the message is not repeated, the damages are limited to the amount received for sending the same, provided the contract so stipulates. Halsted v. Postal Tel. C. Co., 193 N. Y. 293-304,

85 N. E. 1078, 19 L. R. A. (N. S.) 1021, 127 Am. St. Rep. 952; Kiley v. Western Union T. Co., 109 N. Y. 231, 16 N. E. 75; Monsees v. Western Union Telegraph Co., 127 App. Div. 289, 111 N. Y. Supp. 53. But a telegraph company cannot limit its liability by any such provision, where the action is based upon gross negligence. Weld v. Postal Tel. C. Co., 210 N. Y. 59, 103 N. E. 957; Id., 199 N. Y. 88-98, 92 N. E. 415; Id., 148 App. Div. 588-590, 133 N. Y. Supp. 228; Will v. Postal Tel. C. Co., 3 App. Div. 23, 37 N. Y. Supp. 933; Dixon v. Western U. T. Co., 3 App. Div. 60-64, 38 N. Y. Supp. 1056; Empire Roller Rink Co. v. Western U. T. Co., 75 Misc. Rep. 567, 133 N. Y. Supp. 717; Postal Telegraph Cable Co. v. Robertson, 36 Misc. Rep. 785, 74 N. Y. Supp. 876.

"The same rule applies to the provision of the contract that the damages shall be limited to an amount not exceeding 50 times the sum received for sending the telegram, unless specially valued. Public policy requires that the company shall not limit its liability by such a clause, where it has been guilty of gross negligence."

The same rule was followed in United States Telegraph Co. v. Wenger, 55 Penn. St. 262, 93 Am. Dec. 751, where the Court held:

"Telegraph company is guilty of gross negligence, and is therefore liable to the sender of the message for such damages as he sustained in consequence thereof, where a prepaid message, sent from one place to another over the company's line, did not get beyond an intermediate point, and no reason was given by the company for its failure to transmit the message to its destination."

In Wann v. Western Union Telegraph Co., 37 Mo. 472, 90 Am. Dec. 395, the Court held:

> "Telegraph companies may specially limit their liabilities, but will not be protected from the consequence of gross negligence."

IV.

The next assignment of error relates to the ruling of the Court that the evidence does not show that plaintiff suffered any damage by defendant's failure to send the telegram, since he might not have accepted the offer of $90.00 per share for his stock and might not have been able to have delivered his stock to Miller.

This is a question which was not raised by the pleadings in the action and was not the subject of a special defense. These special defenses were confined to the printed conditions on the telegraph blank, which we have discussed above, and the remainder of the answer is confined to denials and admissions of the allegations of the complaint. The only allegation of the complaint relating to this point is numbered XII (Tr. p. 12), and the denial thereof is found on page 20. The question, as it is stated and decided by the Court below, was therefore not an issue in the case. It was not set up in the answer that plaintiff was not in a position to deliver his stock to Miller, consequently no burden was thrown upon defendant to prove this fact. The only reference to this matter was in the cross-examination of

plaintiff (Tr. p. 83), where he stated that his bank stock was in the Security Bank at Oakland, as collateral for a loan. Upon re-direct examination he testified that this bank stock was available to him to sell at that time and that he was in a position to deliver the stock at any time. These statements are reasonable and there is no evidence to the contrary, and in the absence of an issue of fact in the pleadings on this point, should be considered as established. If such issue had been raised, plaintiff would have had the opportunity to meet it by additional evidence of the bank officials at Oakland. It is not reasonable to suppose that they would have objected to a sale of this security, as they could have fully protected themselves either by sending the bank stock to a bank in Boise with instructions to deliver it to Miller upon payment of the money to the credit of the Security Bank; or the whole matter could have been arranged by wire, as Miller was willing on November 30th to pay the money over upon being assured that he would get the stock. (Tr. pp. 61-63.)

For the reasons just stated, the further fact testified to, relating to the time it takes a letter from Oakland to Boise (Tr. pp. 83-84), is wholly insufficient to support the finding of the Court that plaintiff could not have gotten his stock to Boise in time to deliver it to Miller.

The Court below applied to this case the rule followed in Western Union Tel. Co. v. Hall, 124 U. S. 444, and similar cases, cited on page 42 of the record.

Before discussing this rule we wish to briefly call attention to some of the statements made by the Court below in this connection, on page 41 of the record. The statement that plaintiff was necessarily ignorant of the precise situation is not borne out by the admitted facts, neither is there any evidence to support the statement that there was apparently a crisis in Miller's financial ability.

The record shows that prior to plaintiff's departure for California, which was about the middle of November, 1917, he had received several communications from Miller relating to the bank and to the question of Miller's purchasing his stock or his entering into a merger with the Pacific National. Plaintiff did not wish to enter into any merger but wished to sell his stock. They discussed its value pro and con and didn't arrive at anything, because Miller was not ready just then to buy it, but was going away and would be back at a certain time, when he would be ready to negotiate further and they would have no trouble in agreeing on the price, and Miller would buy plaintiff's stock. Plaintiff then informed Mr. T. J. Jones of these facts and that Miller would be back with the money to buy their stock, and plaintiff wanted Jones to negotiate for him, and for them to sell together. Plaintiff then told Miller that Jones would negotiate for him, and left for California. (Tr. pp. 72-73.)

It would appear that plaintiff was fully informed as to the facts, and was anxious to sell his stock. As

to Miller's financial ability to make the deal, there can be no question. On November 30th, the date the telegram was sent, when he was willing to put up the money, he had over $84,000.00 in the Idaho National alone, and never had less than $30,000.00 there up to the close of business on December 4th following. What other resources he had is not shown, as it was unnecessary. Moreover, on the other hand, on page 36, the Court found as follows:

> "I further find that Miller desired and was able to buy the stock at $90.00 per share, and that the telegram is to be construed as advising plaintiff of an offer of $90.00, and, had it been delivered, such is the meaning it would have conveyed to him."

It is our contention that the rule announced in the Hall case and the other cases cited does not apply to this case.

That rule is to the effect that remote and speculative damages, which could not have been reasonably within the contemplation of the parties to a contract, cannot be recovered. In the Hall case the message read: "Buy ten thousand if you think it safe. Wire me." This referred to barrels of petroleum, the market price of which the day the message was sent and should have been delivered was $1.17 per barrel. The message was delayed and when received the next day the price had advanced to $1.35 per barrel. The weakness of plaintiff's case consisted in the fact that there was no evidence in the record to show

that he wished to buy the petroleum to sell the next day or to sell at any future time. Naturally he might not have sold the next day, but might have waited for a further advance, and perhaps made no profits. The possible profits were altogether too remote and speculative. The cases cited all involve possible profit on future sales, but if the facts had shown that the purchase was to be made for the express purpose of selling on the following day, the measure of damages would have been the difference in price. Here, as found by the Court, the message constituted an offer to buy plaintiff's stock at $90.00 per share, which if received would have been at once accepted by plaintiff by wire. Before plaintiff learned of the offer, the bank went into liquidation and the stock became valueless and has so remained ever since. (Testimony of receiver and former cashier, p. 93.) Here the measure of damages is not remote or speculative, but amounts to $4,500.00, the price plaintiff would have received for his stock. In the Hall cases the Court recognizes this rule, and the distinction is clearly pointed out. It is also clearly pointed out in Kerns & Lorton v. Western Union Tel Co., 174 Mo. App. 438; 160 S. W. 556-557, where the telegram was to buy a certain quantity of potatoes, but nothing said about resale. The Court said:

> "Here there was sufficient evidence outside of the terms of the message itself to uphold a finding by the Court that these potatoes were to be bought by plaintiff for resale on their arrival

at Kirksville. It was shown that they had contracted a sale of one-half of the entire lot at $1.10 per bushel. In such circumstances we think loss of profits is made sufficiently certain and the judgment can be upheld on that ground; the case, we think, is brought within the exception noted by Justice Matthews in Western Union v. Hall, *supra*, at the close of the opinion, and in Western Union v. Fellner, 58 Ark. 29, 22 S. W. 917, 41 Am. St. Rep. 81; Jones on Telegraph & Telephone Companies, Pars. 546-549, wherein it is stated that, if the purchase intended was for immediate resale at a profit which was shown could have been made, such profit was a proper measure of damage."

The distinction is also clearly pointed out in Cincinnati Gas Co. v. Western Siemens Co., 152 U. S. 200-206, where plaintiff failed to prove that it could have effected a resale of the goods at a profit. After stating the rule, the Court proceeded:

"But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into. United States v. Behan, 110 U. S. 338, 345, 346, 347; Western Union Tel. Co. v. Hall, 124 U. S. 444, 454, 456; Philadelphia, Wilmington & Baltimore Railroad Co. v. Howard, 13 How. 307."

Obviously the case at bar is not a case involving loss of profits.

It comes within the principle that where a direct offer to purchase is made, which it is shown from the evidence and surrounding circumstances would have been accepted, the measure of damages for failure to deliver the telegram is the actual damages incurred by the loss of the sale. Failure to transmit the message prevented an actual sale. The evidence of this is undisputed. It was not merely speculative and remote as in the cases cited by the Court below.

The rule stated by the Supreme Court of Iowa in Herron v. Western Union Tel. Co., 90 Iowa 129, 57 N. W. 696, is, we submit, the rule applicable to this case. There one Cassidy, after looking at a horse called Mark, owned by plaintiff, made plaintiff's brother an offer to buy this horse, which had no value except for breeding purposes, and requested the brother to telegraph the offer to plaintiff. Accordingly the brother went to defendant's office in Warren, Michigan, and delivered to defendant a night letter reading as follows:

> "Warren, March 31, 1890.
> "To C. C. Herron, Clarksville, Iowa.
> "Have traded with George Cassidy for Mark, three horses, 1, 2, 3, two hundred, balance fifty dollars young cattle.
> "B. B. HERRON."

The evidence showed this offer was to be withdrawn on Wednesday, April 2nd, if not accepted on

or before that day; that B. B. Herron had no authority to accept the offer or sell the horse. The message was not delivered to plaintiff until after the offer was withdrawn. The plaintiff some time after this sold the horse for the best price he could obtain, which was $50.00 in trade. The Court held:

> "Where the dispatch contains an offer for addressee's horse and the receiving agent knows the horse and knows that the dispatch relates to a trade for him and it requires an answer, the company is charged with notice of the importance of the dispatch.
>
> "Where plaintiff's sale of his horse failed because of the delay, and the horse had no regular market value in the neighborhood, and plaintiff has since disposed of him for the best price by reasonable effort attainable, plaintiff may recover the difference between the dispatch's offer and the price realized, with cost of keep and interest."

In the opinion on page 698, the Court said:

> "The value of the property Cassidy offered for the horse was $250; hence plaintiff sold him for $200 less than the amount of Cassidy's offer. It was necessary for plaintiff to pay the expense of keeping the horse from the 2d day of April until he was sold, and the evidence sustains the allowance, if any, made by the jury for that purpose. The loss in price, and the expense of keeping the horse, with interest, represented actual damages which the plaintiff sustained by not accepting the offer of Cassidy; and it is the policy of the law to permit a person injured by the wrong of another to recover the amount of his loss. Where the loss results from a failure

> to sell the property for which there is no market value, its actual value may be ascertained by means of the best evidence of which the case admits. 3 Suth. Dam. 476; 1 Sedg. Dam. Par. 250; Wood, Mayne, Dam. Par. 22; White v. Cattle Co. (Tex. Sup.), 12 S. W. 867. We conclude that the measure of damages adopted by the Court as applied to the facts in this case was not erroneous. The jury were authorized to find that Cassidy would have taken the horse according to his offer had it been accepted, and the verdict is sustained by the evidence."

The same rule is applied in

Hoyt v. Western Union Tel. Co., 85 Ark. 473, 108 S. W. 1056, and in

Wallingford v. Western Union Tel. Co., 53 S. C. 410; 31 S. E. 275; s. c. 60, S. C. 201, 38 S. E. 443, which was a case where plaintiff lost the sale of a car load of mules because the telegram containing the offer to him was delayed in delivery for a week; and consequently he lost the sale, was forced to keep them for several months at great expense and was forced to sell them at the end of that time for a certain sum which was less than the offer. The Court held that the telegraph company was liable for the difference in price and the other expenses incurred by plaintiff since the date of the offer. The Court thus stated the rule in the first citation of the case:

> "It is not, and could not be, questioned that a telegraph company is liable for damages that are the natural and proximate result of its neglect to seasonably deliver a message received by it for transmission and delivery. The question

> here is whether the damages as alleged in the complaint are of the kind named. Damages are a natural result when they are such as usually follow in the ordinary course of things, and they are proximate when they result directly, not remotely, from the alleged cause. Such damages are recoverable because they are supposed to be within the contemplation of the parties when they contract. In this case the loss of the sale of the mules on the terms named was the direct and natural result of the failure to deliver the message, as it is admitted by the demurrer that such sale would have been consummated if the message had been delivered in time."

And the Court in support of the rule cites:

Sitton v. MacDonald, 25 S. C. 71; Telegraph Co. v. James (Ga.), 16 S. E. 83; Squire v. Telegraph Co., 98 Mass. 232; Manville v. Telegraph Co., 37 Iowa 214; True v. Telegraph Co., 60 Me. 9; 25 Am. & Eng. Encyc. Law 848.

Telegraph Co. v. MacKenzie, 31 Tex Civ. App. 178, 81 S. W. 581, is in point and the conclusions of law stated on page 583 apply to this case and recognize the rule for which we contend.

See also Parks v. Alta California Tel. Co., 13 Cal. 422, which has frequently been followed by other Courts, where the same rule is announced. The gross neglect in failing to promptly deliver a telegram in that case caused plaintiff to lose a priority of attachment against a firm which afterwards became insolvent, and plaintiff was unable to collect his claim.

The Court said it was proper to show by evidence that if the message had been delivered the attachment would have been seasonably levied and plaintiff's claim secured.

These cases controvert the proposition made by the learned trial Court, that there is no way to determine whether plaintiff would have accepted the offer. There is every reason, in addition to his own testimony, to show that any reasonable man under the circumstances would have accepted it. He knew the condition of the bank, the merger proposed by Miller which he did not wish to go into, the chances of liquidation, and indicated his desire to sell before going to California.

A large number of the cases are collected in the note to Western Union Tel. Co. v. Caldwell (Ky.), 12 L. R. A. (N. S.) 748, showing that the established rule of the American Courts is that a recovery may be had where the telegraph company is guilty of negligence, although the damages are contingent upon possible action by the sendee, where the evidence shows that such action would have been taken.

In the case of

Larsen v. Postal Tel. Co., 150 Iowa, 748, 130 N. W. 813 (*supra*), the telegram was delivered to the company in May, 1906, to be sent to plaintiff. It was never delivered to him. It was from a government official and read: "Will you accept appointment carpenter $720 per annum, Winnebago agency, Nebraska? Wire answer." It was shown by evi-

dence that this, under the practice in such matters, was equivalent to a tender of appointment. The Court held:

> "Damages for the entire failure to deliver to plaintiff, the addressee, a telegram inquiring if he would accept an appointment to a government position are not so remote and speculative as to offer no grounds for recovery, where the plaintiff testifies that, had he received the message, he would have accepted the position."

In the Nichols case, 159 Fed. 647 (*supra*), decided by this Court, the damages were contingent upon the action of the addressee in adding the 5 per cent to the bid as directed by the sender, and also upon whether the bid for the increased amount would have been accepted by the government officials. This was shown by their testimony. The Court said:

> "We are also of opinion that the damages sued for, and which the defendants in error recovered in the Court below, were not speculative or remote, as they covered only the 5 per cent desired by the defendants in error to be added to their bid, and which the officers of the government having in charge the work in question testified would have been added, had the telegram been delivered prior to the opening of the bids, at noon of the 13th of June, 1903."

So also in the Swan case, 129 Fed. 323 (*supra*), where the telegram advised the addressee of the discovery of rich ore in the Mohawk and that there would be a ten to twenty dollar quick rise, the Court, on page 323, said:

> "On the question of damages we have encountered no such difficulty as seems to have been experienced by the Court below in finding a proper measure of damages for the case. If the plaintiff was entitled to recover even nominal damages, that would be better than to give a judgment for costs against him. The proper measure of damages is what the plaintiff lost through the negligence of the defendant, which was the difference between what he had to pay for the stock on the morning of May 2d and what it would have cost him in the forenoon of May 1st, when he should have received the dispatch, or notice that it could not be sent."

It would seem unnecessary to further lengthen this brief by a citation of additional authorities to show that the rule relating to speculative and remote profits or damages does not apply to this case, and that the Court should have held that plaintiff was damaged in the sum of $4,500.00 by reason of defendant's gross negligence.

V.

The remaining assignment of error relates to the entering of judgment against plaintiff in favor of defendant for $42.45 costs. (Tr. 43.)

It seems to us that under any theory of the case the Court should not have entered this judgment. Under condition No. 1 of the telegraph blank, plaintiff was at least entitled to judgment for the amount paid for sending the telegram, and under condition No. 2 (Tr. 100), he was entitled to judgment for $50.00

and his costs. This matter was called to the Court's attention on the motion for new trial (Tr. 115-16) and is expressly so held in the quotation in the Swan case (*supra*), 129 Fed. 323.

For the foregoing reasons we respectfully submit that the judgment should be reversed with directions to enter judgment in favor of plaintiff for $4,500.00 with interest from December 1, 1917, at the legal rate, and for costs as prayed for in the complaint.

VI.

The question may be raised by defendant on this appeal as to the refusal of the court to sustain defendant's motion to strike the bill of exceptions from the record. While we contend that this ruling of the Court is not before this Court for review, since defendant has not appealed, we will refer the Court to the authorities cited to the Court below and which sustain his action.

In this case the order extending the time for filing plaintiff's proposed bill of exceptions was not made within the 10 days allowed by the rules, but was made a few days later on a day of the same term, after the motion for new trial had been overruled. This was held to be within the power of the Trial Court in

Hunnicutt v. Peyton, 102 U. S. 333, 335;
Southern Pac. Co. v. Johnson, 69 Fed. 559, 561;

Russo-Chinese Bank v. National Bank of of Commerce, 187 Fed. 80, 86, both decided by this Court.

United States v. Waite, 193 Fed. 258.

Cases to the same effect are numerous in other circuits, but we think the above are sufficient without a further citation of authorities. In this case, plaintiff filed a motion for a new trial within the 30 days allowed by the rules after entry of judgment, which motion was argued before the Court and overruled. If a new trial had been granted, the bill of exceptions would have been unnecessary. Plaintiff's counsel at the same time applied for the order extending the time fixed by the rules within which to file his bill of exceptions, and this motion was allowed by the Court at the time the motion for new trial was overruled, and on a day of the same term at which the case was tried. The Court still had jurisdiction over the case, and we think it was clearly within the power of the Court under the authorities cited, to grant the extension. The Court allowed 20 days, and the bill of exceptions was filed and served within this time.

Respectfully submitted,

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